



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION NO.11 OF 2012

**EMILY NUNGARI KAGUNDA.....APPLICANT**

**VERSUS**

**NELSON STEPHEN KAMAU WANYOIKE.....RESPONDENT**

**RULING**

The applicant, Emily Nungari Kagunda has moved this court under a Misc Notice of Motion said to have been brought Under **Orders 26 & 40 of Civil Procedure Rules and Sections 3 & 3A of Civil Procedure Act** and all other enabling provisions of the law. She seeks the following orders with costs:-

- 1. THAT this Honourable Court be pleased to Transfer the Divorce Cause No. 440 of 2011 filed at the Chief Magistrate's Court from the Chief Magistrate's Court to the High Court of Kenya at Nairobi.***
- 2. THAT this Honourable Court do order and direct the Respondent/Petitioner to deposit in Court the amount of Kenya shillings Fifteen Million (Kshs.15,000,000) plus security of costs equivalent to Kenya Shillings Five Hundred Thousand (Kshs.500,000).***
- 3. THAT this Honourable Court do freeze the Respondent/Petitioner's Accounts namely No. 250 1108 1800 48, the Bank Account with Co-operative Bank No.011 0063 3063 00 and the Bank Account with Equity Bank Account No. 017 0193 6519 68.***
- 4. THAT this Honourable Court do restrain the Respondent/Petition from interfering, alienating, selling, transferring or in any manner disposing off and all the immovable matrimonial properties he is holding pending the hearing and determination of the Divorce Cause herein.***

The application is supported by the applicant's affidavit sworn on 31<sup>st</sup> January 2012 and is premised on the grounds, mainly, that the applicant claims from the respondent a sum of Kshs.15,000,000 (Fifteen Million) which she alleges to have advanced to the respondent during the subsistence of their marriage, the subject matter of the **Divorce Cause Number 440 of 2011**, wherein the applicant has filed a cross petition, claiming, *inter alia*, the said sum and other matrimonial properties which claims she says are way above the value of the civil jurisdiction of the sub-ordinate court. The applicant holds the view that the lower court lacks jurisdiction to grant the orders sought in prayers 3, 4 & 5, hence the request that the suit be transferred for hearing and determination by this court.

In response to the application, the respondent filed a replying affidavit sworn on 7<sup>th</sup> February 2012 as well as a Notice of Preliminary Objection dated and filed on 7<sup>th</sup> February 2012. Under the preliminary objection, the respondent prays that the Notice of Motion be dismissed with costs, *in limine*, on two grounds set out as follows:-

**1. There is a special procedure and jurisdiction conferred under the Matrimonial Causes Act Cap 152, the rules made thereunder and the African Christian Marriage & Divorce Act Cap 151 over matrimonial matters. This Honourable Court lacks jurisdiction to entertain this application based on the Civil Procedure Act and Rules unless where such rules are specifically adopted into the Statute and rules mentioned above.**

**2. Section 3 of the Civil Procedure Act specifically excludes any jurisdiction or power conferred, or any special form or procedure prescribed by any other law from being limited or affected by the Civil Procedure Act.**

A copy of the cross petition has not been filed before this court for me to verify the applicant's claim.

Oral submissions were made by counsel in regard to the Preliminary Objection. Learned counsel for the respondent, Mr. Boniface Njiru, submitted that, since the matter before the lower court is purely a matrimonial cause the Civil Procedure Act and Rules cannot be invoked in the manner sought. He submitted further that the entire dispute between the applicant and respondent is one which is capable of determination by the subordinate by virtue of **Section 14 of the African Christian Marriage & Divorce Act (Chapter 151 of the Laws of Kenya)** under which the union between the parties herein was celebrated. Counsel submitted that the said section confers upon the subordinate court the same jurisdiction as is conferred upon this court by the **(Matrimonial Causes Act (Chapter 152 of the Laws of Kenya))**. Mr. Njiru submitted further that no specific provision of the law has been cited by the applicant to warrant the transfer of the matrimonial cause to this court or to the granting of the orders sought herein. In his view, the said orders ought to be applied for in that cause.

In reply, learned counsel for the applicant Miss. Kanyiri submitted that, since the lower court's jurisdiction is limited to a maximum of Kshs 5,000,000 (Five million) the claim by applicant against the respondent cannot be determined in the divorce proceedings. She submitted further that, in addition, the applicant seeks injunctive orders and security for costs which are not available under either **Cap 151 or Cap 152**, submitting further that **Cap 151** only deals with the dissolution of marriages and related orders within the subordinate court's jurisdiction. In response to this submission Mr. Njiru submitted that under **Section 14 of the Cap 151** the lower court enjoys the same jurisdiction as the High Court in matrimonial causes and can validly determine the applicant's claim which, in any event is not one brought under the **Married Women's Property Act, 1882**.

I have considered the Preliminary Objection and legal points arising thereunder. The submission that the subordinate court enjoys the same jurisdiction as the High Court in matrimonial causes is correct. This jurisdiction, as submitted by counsel, is conferred by **Section 14 of Cap 151** which states as follows:-

***“14. Subordinate courts of the first class shall have the same jurisdiction, in the case of marriages solemnized or contracted under this Act or the Native Christian Marriages Act (now repealed), as is vested in the High Court by virtue of the Matrimonial Causes Act.”***

This, in my considered view, means that any issues determinable by the High Court under the Matrimonial Causes Act are determinable equally by the subordinate court, irrespective of the value of the subject matter. It follows therefore that the subordinate court has equal power to order the settlement of a wife's property in divorce proceedings as does the High Court under **Sections 27, 28 & 29** of the **Matrimonial Causes Act**. It is not very clear, though how **Section 27 & 28** would apply in the present circumstances. However, under **Section 29(1) of the Cap 152**, protective orders as regards the property of a wife are available upon divorce pursuant to an application made by the wife by way of a Chamber Summons within the divorce cause. The said section provides, *inter alia*, as follows:

**“ 29 (1) Any wife in whose property the husband has acquired an interest by virtue of the marriage may, if deserted by him, apply by petition to the court for an order to protect any property which she may have obtained or may obtain after the desertion, against him and his creditors and any person claiming under him.**

**(2).....**

**(3).....**

**(4).....**

**(5).....**

**“(6) If the husband or any creditor or person claiming under him seizes or continues to hold any property of the wife after notice of any such order, the wife may by action, recover such property and also a sum equal to double its value.”**

Learned counsel for the respondent is right in his submission that the application of the Civil Procedure Act and Rules is exempted in matrimonial causes by virtue of **Section 3** of the **Civil Procedure Act**. This submission is supportable further by the fact that the reliefs sought under **Orders 26 and 40** of the **Civil Procedure Rules** are only available where there exists, in the first place, a civil suit, filed under the Civil Procedure Act and Rules, as defined under **Section 2** of the **Civil Procedure Act**. It is quite clear from **Section 29 (6) of the Matrimonial Causes Act** that to sustain an application for the relief sought under prayers 3, 4 and 5 of the Notice of Motion of 31<sup>st</sup> January 2012, the applicant must first file a recovery action or suit under the Civil Procedure Act and Rules. This notwithstanding the applicant still has the right to pursue her claim under the **Married Women’s Property Act 1882**.

Given the above, it appears that, neither a transfer of the divorce cause, nor the inclusion of such claim can fully assist the applicant in the manner sought even as I hold that the subordinate court has equal jurisdiction as the High Court in Matrimonial Causes. That power is limited to orders obtainable under that Act. As regards the proprietary claim the lower court can only make an order for protection of the property. The enforcement of such order, it seems can only be pursued in a recovery action as provided for under Sub-section 6.

In view of the above, I hereby uphold the preliminary objection and dismiss the application. Additionally I find the Miscellaneous Cause herein to be incompetent and do hereby strike it out with costs.

Orders accordingly.

**DATED, SIGNED and DELVIERED at NAIROBI this 8<sup>TH</sup> DAY OF March 2012.**

**M.G. MUGO**

**JUDGE**

**In the presence of :**

**Mr. Ng’ang’a holding brief for Ms. Kanyiri for the applicant.**

**Mr. Njiru for the respondent.**